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**IN THE
Supreme Court of the United States**

**OCTOBER TERM, 1947
No. 442**

RANDOLPH PHILLIPS,

Petitioner,

against

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

**PETITIONER'S REPLY TO RESPONDENT'S
BRIEF IN OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI**

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December 16, 1947

CONTENTS

	PAGE
The Misstatement on Jurisdiction	1
The Misstatement With Respect to the Motion to Dis- pense With Printing of the Record	2
The Misstatement With Respect to the Question Pre- viously Presented to This Court	3
The Misstatement With Respect to the Pleadings on the Motion to Vacate	3
Misstatements With Respect to the RFC Letter of April 6, 1944	4
The Misstatement With Respect to "Alteration" of the "Working Capital Minute"	5
The Misstatement With Respect to Robert R. Young's Testimony	5
The Misstatements With Respect to Individuals and the Senate Committee	6

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PETITIONER'S REPLY BRIEF

This Reply Brief is limited to corrections of eight misstatements in Respondent's Brief.

The Misstatement on Jurisdiction

Respondent states that this Court "is without jurisdiction to review on certiorari the order of the District Court" because "Chapter XV of the Bankruptcy Act expired by limitation on November 1, 1945" (p. 2). Yet Respondent cannot be ignorant of the following language of Chapter XV:

"Article X—Termination of Jurisdiction

"Sec. 755. The jurisdiction conferred upon any court by this Chapter shall not be exercised by such court after November 1, 1945 except in respect of any proceeding initiated by filing a petition under Section 710 hereof on or before November 1, 1945."

The proceeding herein was initiated on July 2, 1945 (See footnote 4, p. 4 of Respondent's brief). This Court plainly has jurisdiction under Section 745 of the Act (11 U. S. C. 1245).

The Misstatement With Respect to the Motion to Dispense With Printing of the Record

Respondent on page 2 of its brief raises the same issues offered in its Response to Petitioner's Motion to Dispense with Printing of the Record for Purposes of the Petition for Certiorari. Respondent states that the record before the lower court on Petitioner's Motion to Vacate "consists not of the '5,000 pages of testimony and exhibits' on which the Special Court entered the Decree, but rather of the motion itself together with the document alleged in the motion to contain the 'newly discovered evidence'" (Respdt.'s Br., p. 3). Yet the District Court in denying the Motion expressly stated that all the allegations of fact in the Motion had been "considered in the light of the testimony during the hearing of the case" (See (b) of Court's order at p. 81 of Petitioner's Brief). The District Court's language shows how untrue is Respondent's statement (p. 3) that these previous records "which Petitioner now seeks to have brought before this Court have no bearing on the issue".

For the convenience of the Court nine copies of the Motion to Vacate, as printed for the lower court, together with nine copies of the Senate record are being filed with the Clerk simultaneously with this Brief.

The Misstatement With Respect to the Question Previously Presented to This Court

Respondent endeavors to represent that the Petition filed in May, 1946 was similar to the present Petition. It quotes the pending Petition's statement that the District Court "applied erroneous standards of law in determining the issues of fraud and good faith" and then says (p. 4) "that same question was presented to this Court at its October 1945 Term by the same Petitioner". This is not true, as will be seen by reference to page 3 of the previous petition (No. 1220, October Term 1945) and pages 2 to 4 of the present Petition where the questions are listed. In 1946 it was expressly urged by Petitioner that the District Court erred in requiring a showing of "intentional fraud" in order to prove lack of "good faith". It was then expressly stated that "Petitioners do not charge that the record shows intentional fraud" (p. 3, Pet. for Rehearing). In the present Petition actual or real fraud is now made the chief issue in view of the evidence discovered by the Senate Committee.

The Misstatement With Respect to the Pleadings on the Motion to Vacate

Despite the impression sought to be conveyed by footnote 5, page 4 of Respondent's Brief, Respondent did not answer the Motion to Vacate. Thus there is no issue of fact since all of the facts alleged in the 41 numbered paragraphs of the Motion are admitted in accordance with the familiar rules applicable to pleadings.

The Senate record, containing the 23 new documents from the B & O or RFC files as well as the sworn admis-

sions of the B & O and RFC officials, was filed by Petitioner (See No. 38, p. 27 of Motion) solely to support the offer to prove the existence of these documents and admissions as set forth in the Motion. The fact that Respondent had entered denials and protestations on some points in the Senate record cannot substitute for an answer to the Motion to Vacate.

Misstatements With Respect to the RFC Letter of April 6, 1944

Respondent on page 13 of its brief touches the issues presented by the Senate Committee's discovery that the letter of April 6, 1944 had been drafted by B & O's financial Vice President, Russell L. Snodgrass. The suggestion that the drafting of such a letter in the circumstances of the B & O-RFC negotiations was "common business practice" does not square with Respondent's and RFC's elaborate concealment from the lower court of the authorship of the letter by perjury and the other means described in Petitioner's brief (pp. 39 *et seq.*).

It might also be noted that Respondent's description of this letter as having been "submitted by Respondent's Financial Vice President to RFC for its use, *if approved* by it" (Respdt.'s Br., p. 13) is impossible to reconcile with the lower court's finding that the RFC letter of April 6, 1944 was neither "inspired" nor "stimulated" by B & O as stated in the lower court's opinion (Pet.'s Br., p. 27). This description of the draft letters is, in fact, an admission that the RFC's terms were originated by B & O since there

is no evidence that the terms of the April 6th letter were stated by RFC to B & O at any time prior to receipt of the drafts. The statement attributed to Mr. Jones by Respondent (p. 13) was made on May 12, 1944 (Sen. 17).

The Misstatement With Respect to "Alteration" of the "Working Capital Minute"

Respondent devotes approximately a page of its brief to indicating that Mr. George F. May, B & O's Secretary from February 1, 1929 to December 31, 1944, did not know of the alteration and was not a party to it. Petitioner has never supposed or suggested that Mr. May was a party to the alteration of the minute in question. Mr. May had retired as Secretary before Respondent began the present Court proceedings. The minute was altered by somebody else.

The Misstatement With Respect to Robert R. Young's Testimony

Four pages of Respondent's brief are taken up with discussing the testimony of Robert R. Young, Chairman of the Chesapeake & Ohio Railway Company, who for some reason is never identified by name by Respondent. The Court should note that Mr. Young's testimony is not referred to or relied upon in any way in the Motion to Vacate. Nevertheless Respondent makes it appear that this testimony is relied upon "as ground for the Second Petition" (p. 19).

The Misstatements With Respect to Individuals and the Senate Committee

Respondent's brief is noteworthy for its failure to come to grips with the basic issues raised by Petitioner. Instead it appears to be a diversion in the form of an oblique attack on the Senate Banking and Currency Committee, which unanimously voted to make the investigation, for its temerity in inquiring into Respondent's acts. Innuendoes concerning the Chairman of the Committee, the Committee's counsel, the former Chairman of the Senate Interstate Commerce Committee, former B & O General Solicitor Clay and Petitioner constitute the substance of Respondent's brief. A similar series of innuendoes against individuals were set forth by Vice President Snodgrass in a statement read by him at the close of the Senate hearings. The following colloquy then ensued:

"The Chairman: As counsel for the B. & O. and an eminent lawyer, I am asking you very definitely if you associate yourself with those statements.

Mr. Dean: No, sir. * * * Insofar as Mr. Snodgrass engaged in personal feuds or personal attacks on individuals, the railroad and its counsel naturally disassociate themselves from those attacks" (Sen. 645).

Senator Maybank, the ranking Democrat present and speaking for the minority members of the Committee, stated to the Chairman after the Snodgrass attacks:

"I would like to say that in my judgment, as on the minority side, that you have been fair and honorable and honest as anybody could be in the hearings" (Sen. 647).

The conduct of the investigation also brought forth the following volunteered statement by Mr. Dean for B & O:

"Mr. Dean: I would like to thank the chairman of the committee on behalf of the B. & O. Railroad for the patience and courtesy and all of the time that you have spent on a very difficult problem.

"The Chairman: And would you, also, say the fairness with which the hearings have been conducted? If you do not feel that way, say so, for you and I are frank fellows.

"Mr. Dean: I think you have been most fair and most patient and courteous" (Sen. 684).

Respectfully submitted,

JOSEPH B. HYMAN,
Counsel for Petitioner.

December 16, 1947